SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 610

JOHN L. SULLIVAN, Tax Commissioner of the State of Connecticut; GERALD A. LAMB, Treasurer of the State of Connecticut; LOUIS I. GLADSTONE, Comptroller of the State of Connecticut; and ROBERT K. KILLIAN, Attorney General of the State of Connecticut;

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANTS' REPLY BRIEF

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Time limitations compel the Appellants to comment only briefly at this time on a few of the inconsistencies and discrepancies in the Brief for the United States.

1. The basic fallacy in the arguments advanced by the Appellee is that they are all predicated on the proposition that there is no distinction between a sales tax and a compensating use tax. Therefore, the Appellee erroneously concludes each of the taxes complements the other.

We would refute that proposition and the resulting erroneous conclusion.

The sales tax and the use tax are distinct from each other. They are based on different conceptions and are assessments on different transactions, even though in many instances they bring about the same result. *Connecticut Light and Power Co.* v. *Walsh,* 134 Conn. 295, 57 A. 2d 128. Speaking generally, the sales tax is imposed upon transactions within the state and the use tax upon articles bought in other states which, if bought in Connecticut, would be subject to sales tax. *United Aircraft Corporation* v. *O'Connor,* 141 Conn. 530, 107 A. 2d 398.

This Court has recognized that the use tax is intended to complement the sales tax by creating equality of taxation of purchasers on the use of property purchased outside the state, being designed to reach transactions which cannot be reached as sales because of the so-called commerce clause (Art. 1, Sec. 8, Clause 3) of the Constitution of the United States. *McLeod* v. *J. E. Dilworth Co.,* 322 U.S. 327.

It should be obvious from the above that if Connecticut did not have a sales tax it would have no need for a use tax. Plainly stated, the lower court has permitted the tail to wag the dog.

Simply stated, the Appellee is urging this Court to determine that Congress, by including in the 1962 amendatory language the phrase "or the use thereof" after the words "personal property", clearly intended to expand the application of Section 514 of the Soldiers' and Sailors' Civil Relief Act to encompass not only compensating use taxes, but also the whole scheme of sales taxation.

We submit that the Appellee has placed the "use tax" cart before the "sales tax" horse.

Since the Appellee cannot sustain the burden of proving that Section 514 removes the jurisdictional grounds for imposition of the Connecticut sales tax, its arguments are untenable.

2. The Appellee is not consistent in its argument relative to the purpose and intent of the phrase "or the use thereof" appearing in the amendments to Section 514 of the Soldiers' and Sailors' Civil Relief Act.

In the 1944 amendment (58 Stat. 772), the phrase "or the use thereof" was placed after the words "motor vehicles" and Appellee admits that Congress by the use of the phrase "sought to remove a serviceman's exemption from registering his automobile in his host state, unless he had registered (it) in his home State". (Appellee's Br., 15).

Significantly, Appellee does not assert the claim that the phrase was intended to extend to motor vehicles and motor vehicles only immunity from "use" taxes such as Connecticut seeks to impose on servicemen.

In the very next paragraph (Appellee's Br., 16), Appellee deals with the 1962 amendment (76 Stat. 768) in which the phrase "or the use thereof" was placed after the words "personal property" and argues that, although the amendment was intended to deal with ad valorem taxes, the phrase should be interpreted to extend immunity from "use" taxes such as Connecticut seeks to impose on servicemen in this case.

Evidently when it suits their purposes, some government officials are extremely adept switch-hitters.

In our view, the inclusion of the phrase after the words "motor vehicles" in the 1944 amendment was intended to encompass any taxes which astute tax officials might conceive

to annually subject motor vehicles to taxation for the "use" of state highways during the taxing period.

In like manner, the phrase was added after the words "personal property" in the 1962 amendment to encompass any taxes which tax officials might conceive to annually subject to taxation a servicemen's personal property when it was being "used" by his wife and children in a taxing jurisdiction from which the serviceman was absent pursuant to military orders.

3. Appellee argues (Appellee's Br., 25) that the evolution of Section 514 demonstrates that every time the "precise scope" of the statute was open to question, Congress chose to broaden its application. Appellee's staff have convenient memories. At page 7, footnote 3 and page 15 of its brief the two amendments to Section 514 are correctly referred to as "clarifying" amendments. They were so characterized when they were proposed to Congress and clearly embraced only ad valorem taxes. Accordingly, the argument that the "clarifying" amendments broadened the application of Section 514 is fallacious.

Further, it should be noted that the 1962 amendment was proposed to Congress while the so-called *Bottomley* case (*United States et al* v. *Arlington County, et al*, 326 F. 2d 929) was pending and was designed to assure the tax immunity which the court ultimately determined Section 514 (prior to the 1962 amendment) granted to members of the armed forces.

We respectfully suggest that in the instant case the Appellee should more properly be pressing its petition for an enlargement of such tax immunity in the Halls of Congress than in the courts. The courts cannot grant tax exemption by judicial fiat when Congress has not chosen to expressly confer it.

4. Surprisingly, the Appellee takes issue with the conclusion expressed in the Appellants' Brief to the effect that under the lower court's decision a nonresident serviceman would be immune from sales and use taxes in every state except his home state. (Appellee's Br., 37, footnote 27). Our conclusion is based on the decision of the U. S. Court of Appeals for the Fourth Circuit in *United States et al* v. *Arlington County, et al,* supra, stating, "Thus we think the Act makes it clear that the Congress intended to exempt the serviceman from taxation on his personal property except by his 'home' state". We concur with that court's interpretation of Section 514.

It naturally follows that when the lower court in the instant case expanded the scope of Section 514 to encompass sales and use taxes the serviceman acquired immunity from those taxes in every state except his home state.

Accordingly, the absurd factual situations cited in Appellants' Brief (p. 23), if the decision of the lower court is not reversed; are properly delineated.

Further, since the lower court's decision was partially grounded on the language of Section 514(1) "taxation in respect of . . . personal property", the decision extends the immunity to the state's taxes on the purchases of gasoline and cigarettes by nonresident servicemen since those taxes also fall on the consumer and are built into the purchase price.

5. The Appellee seeks to minimize the administrative problems which will result if tax immunity is extended to encompass the above taxes. (Appellee's Br., 35).

Unfortunately, the more one dwells on the effects of the lower court's decision, the higher the mountain of problems becomes. It is like dropping a stone into a pond

and watching the ever-widening ripples reveal new areas affected by the decision. For example, it occurs to us that nothing in Section 514 precludes a serviceman from exercising his right to acquire a new domicile in the state where he is stationed. Therefore the retailer will have the additional burden thrust upon him to determine whether each serviceman entering his store is a bona fide nonresident or whether the serviceman has acquired a new domicile, i.e., "home" state, and is subject to tax.

Respectfully submitted,

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